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I. INTRODUCTION

"Bias Allowed at Small Utah Firms"[1] announced the arrival of the Utah Supreme Court's closely contested (three-two) decision in *Burton v. Exam Center Industrial*.[2] While the court correctly chose between an individual's right to be employed regardless of age and the Utah legislature's express intent to limit that right, the majority's failure to clearly analyze Burton's claim made its opinion appear poorly reasoned and its decision more difficult than necessary. Normally, such a failure would be harmless. However, as the issues that faced the court in *Burton* continue to surface in the future, the need for clear and complete reasoning will become increasingly apparent.

This Note begins in Part II with a discussion of the relevant portions of the Utah Antidiscrimination Act (UADA) and overviews the tort of discharge in violation of a public policy. Part III then briefly explains the factual and procedural background of the *Burton* decision. Part IV analyzes the reasoning of the majority and dissenting opinions, focusing on two specific issues. First, it compares the strengths of the policy-related arguments made by the majority and dissent in *Burton*, concluding that the majority offered the stronger arguments. Second, it examines Burton's claim in relation to established Utah law governing the tort of discharge in violation of a public policy—a step the *Burton* majority never took. This analysis shows that the Utah Supreme Court rightfully rejected Burton's claim but failed to carefully compare Burton's claims with the tort's requirements. Part V offers a brief conclusion.

This Note contends that, while the court reached the correct decision in *Burton*, a lack of thorough analysis of one key area of law makes the opinion appear more difficult than it truly was. Like view-

1. Ray Rivera, *Bias Allowed at Small Utah Firms*, SALT LAKE TRIB., Jan. 20, 2000, at A1. The view taken by the Deseret News was somewhat softer. *See*, *Age Bias Ruled Not Illegal in Small Firms*, DESERET NEWS, Jan. 20, 2000, at B6.

2. No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000).

ing a runner, who after dominating a race, stumbles at the finish line and barely finishes ahead of the nearest competitor, one walks away from the *Burton* majority opinion with the impression that the race was much closer than it really was.

II. BACKGROUND

To understand the issues that faced the Utah Supreme Court in *Burton*, some understanding of the UADA and the tort of discharge in violation of a public policy is essential. This section recounts the relevant provisions of the UADA and explains the history and elements of the tort at common law.

A. The UADA[3]

When an employee wishes to bring a claim of employment discrimination based on age, the UADA provides the employee's exclusive state law remedy.[4] Thus, the employee cannot also raise the tort claim of discharge in violation of a public policy. The UADA governs both the process and remedies available to the employee. This section reviews the legislative history of federal legislation upon which the UADA is based, some of the statute's essential provisions, and the extensive administrative process that an employee must follow to bring an employment discrimination claim under the statute.

1. Legislative history by inference

Unfortunately, the legislative history of the UADA was not recorded. However, as the UADA is based on both Title VII of the Civil Rights Act of 1964 and the federal Age Discrimination in Employment Act (ADEA), many of the Utah legislature's concerns can be inferred from the legislative history of those federal acts.

The underlying legislative goal of Title VII and subsequent legislation (including state equivalents, such as the UADA) was to eliminate discrimination from U.S. society. However, these legislative acts have limited application. Title VII, for example, exempts employers with fewer than fifteen employees from compliance.[5] Similarly, the

3. At the time *Burton* commenced, the UADA was codified at UTAH CODE ANN. § 34-35-1 (1994). The UADA is presently located at UTAH CODE ANN. § 34A-5-1 (1998). However, the issues in question were unaffected by this change.

4. *See* UTAH CODE ANN. § 34A-5-107(15) (1998).

5. *See* 42 U.S.C. § 2000e(b) (1994).

ADEA exempts employers that have less than twenty employees.[6] These limitations show that Congress considered other factors besides its desire to combat discrimination in implementing Title VII and related legislation.[7]

More specifically, while eliminating discrimination drove Congress's implementation of Title VII's general framework (which includes the ADEA), at least two additional concerns influenced Congress's decision to limit the legislation's applicability. First, Congress did not want to intrude on the highly personal and intimate relationships associated with small employers, recognizing that many small employers are family-operated businesses.[8] Acknowledging that personal and intimate relationships frequently form part of such businesses, Congress concluded that the government should refrain from unduly intruding into the small-business environment.[9]

Second, Congress desired to protect businesses with limited resources from the costs and burdens resulting from compliance with the federal statute and any resulting litigation.[10] As the Seventh Circuit recognized, this concern also applied to the ADEA's twenty employee exemption, which was instituted "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail."[11]

Thus, the competing public policy concerns contemplated by Congress in implementing Title VII and the ADEA indicate the delicate balance Congress attempted to achieve: eliminating discrimination while avoiding unnecessarily intruding into intimate, personal relationships or burdening small employers with the costs of compli-

6. *See* 29 U.S.C. § 630(b) (1994).

7. Amicus for Utah Manufacturers advanced a similar argument. *See* Brief for Amicus Utah Manufacturers at 19, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000). In addition to noting the cost of compliance, amicus also argued that the legislative history indicates a concern that government control over small businesses would cause the government to become involved in relationships of small businesses that are often intimate or familial in nature. *See id*. at 18.

8. *See generally* 110 CONG. REC. 13,085-88 (June 9, 1964).

9. *See generally id*.

10. *See* Papa v. Katy Indus., Inc., 166 F.3d 937, 940 (7th Cir. 1999); *see also* Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994) (holding that limiting application of the ADEA to businesses with more than 20 employers was to reduce the burden of the ADEA on small employers).

11. *Papa*, 166 F.3d at 940 (citations omitted); *see also Birkbeck*, 30 F.3d at 510.

ance. The result was limited coverage of Title VII and the ADEA to employers with a certain number of employees, "[striking] a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims."[12] The Utah Legislature's decision to limit the UADA to employers with at least fifteen employees likely involved concerns similar to those of Congress.

2. The UADA's policy provisions

The UADA clearly forbids discrimination on the basis of age. The statute establishes that it is a discriminatory, or prohibited, employment practice "[f]or an employer to refuse to hire, or promote, or discharge. . . any person otherwise qualified, because of race, color, sex, pregnancy, childbirth, or pregnancy-related conditions, age, if the individual is 40 years of age or older, religion, national origin, or handicap."[13]

As previously noted, however, the UADA does not apply to all employers. An "employer" is statutorily defined as "the state; any political subdivision; board, commission, department, institution, school district; . . . or a person *employing 15 or more employees* within the state for each working day in each of 20 calendar weeks or more in the current or preceding calendar year."[14] Thus, any private employer with fewer than fifteen employees is not subject to the provisions of the UADA. The Act also eliminates religious organizations or associations and their subsidiaries and agents from its definition of an employer.[15]

3. UADA procedures

As "the exclusive remedy under state law for employment discrimination based upon race, . . . age, religion, national origin, or disability,"[16] the UADA details the procedures through which an aggrieved individual must file a claim with the Utah Anti-Discrimination Division (UADD). The individual, on his own or

12. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995); *see also Birkbeck*, 30 F.3d at 510.

13. UTAH CODE ANN. § 34A-5-106(1)(a)(i) (1998).

14. § 34A-5-102 (8)(a) (emphasis added).

15. § 34A-5-102(8)(b).

16. § 34A-5-107(15).

through counsel, must sign and file a request for agency action.[17] This request is made under oath and must "be filed within 180 days after the alleged discriminatory or prohibited employment practice occurred."[18]

Before the UADD schedules a hearing on the matter, it assigns an investigator to help the parties negotiate a settlement.[19] If the parties fail to reach a settlement, however, the investigator is required to formally submit findings of fact to the agency director.[20] In the event that there is insufficient evidence to support the employee's allegations of discrimination, the director may issue a determination and order the dismissal of the adjudicative proceeding.[21] Should either party desire to appeal the director's decision, the appeal must be made in writing within thirty days of the decision, or the order issued by the director becomes the final order of the commission.[22] A similar process occurs if the investigator uncovers sufficient evidence to support the allegations of discrimination.[23]

Subsequent hearings are available if the parties properly appeal, and all decisions are subject to judicial review.[24] "Conciliation between the parties is to be urged and facilitated at all stages of the adjudicative process . . ." [25] in order to avoid the expense of litigation. This emphasis on conciliation is much greater than that found in typical civil litigation.

B. Tortious Discharge in Violation of Public Policy

Having no recourse under the UADA because his employer had fewer than fifteen employees, the *Burton* plaintiff brought a common law claim of tortious discharge in violation of a public policy.[26] This section reviews the history of this particular tort in Utah and identifies its prima facie elements.

17. *See* § 34A-5-107(1).
18. § 34A-5-107(1)(c).
19. *See* § 34A-5-107(3)(a).
20. *See* § 34A-5-107(4).
21. *See* § 34A-5-107(4)(b).
22. *See* §§ 34A-5-107(4)(c)-(d).
23. *See* §§ 34A-5-107(8), (9), (12).
24. *See* § 34A-5-107(12).
25. § 34A-5-107(10).
26. Brief for Appellant at 4, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000).

1. The history of tortious discharge in violation of public policy in Utah

Utah case law first recognized the tort of discharge in violation of a public policy in *Berube v. Fashion Centre, Ltd.*[27] In *Berube*, the Utah Supreme Court held that "[w]here an employee is discharged for a reason or in a manner that contravenes sound principles of established and substantial public policy, the employee may typically bring a tort cause of action against his employer."[28] While affirming that statements by the legislature can constitute a public policy, the court refused to limit public policy solely to enactments by the state legislature.[29] The court concluded that "[l]imiting the scope of public policy to legislative enactments would necessarily eliminate aspects of the public interest which deserve protection. . . . Judicial decisions can also enunciate substantial principles of public policy in areas which the legislature has not treated."[30] The court also asserted that "[n]ot every legislative enactment . . . embodies public policy; only those which protect the public or promote public interest qualify."[31]

The *Berube* court specifically warned against the overuse of the principles of public policy in justifying a claim for discharge in violation of a public policy: "We also stress that actions for wrongful termination based on this exception must involve *substantial* and *important* public policies."[32] Furthermore, the court committed to "construe public policies narrowly and . . . generally utilize those based on prior legislative pronouncements or judicial decisions, applying only those principles which are so substantial and fundamental that there can be *virtually no question as to their importance for promotion of the public good*."[33]

Since *Berube*, Utah courts have continued to fine-tune the scope of public policy on a case-by-case basis.[34] Rather than explicitly define what constitutes a public policy, the Utah Supreme Court explained in *Peterson v. Browning* that "declarations of public policy can be found in our statutes and constitutions."[35] Such declarations

27. 771 P.2d 1033 (Utah 1989).
28. *Id.* at 1042.
29. *See id.* at 1043.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* (emphasis added).
34. *See* Peterson v. Browning, 832 P.2d 1280, 1282 (Utah 1992).
35. *Id.*

must be expressed in constitutional or statutory language that clearly expresses the public conscience and only occurs "when the affected interests of society are substantial."[36]

The *Peterson* court further indicated that actions falling within the public policy exception to at-will employment "typically involve termination of employment for (1) refusing to commit an illegal or wrongful act, (2) performing a public obligation, or (3) exercising a legal right or privilege."[37] The court also declared that an action for discharge in violation of a public policy sounded in tort, allowing the employee to recover not only economic losses such as back pay but also consequential damages (e.g., pain and suffering) and possibly punitive damages.[38]

2. The elements of discharge in violation of a public policy

To establish a prima facie case of wrongful discharge in violation of a public policy, an employee must satisfy the four-prong test set forth in *Ryan v. Dan's Food Stores, Inc*.[39] The employee must show "(i) that [the] employer terminated [the employee]; (ii) that a clear and substantial public policy existed; (iii) that the employee's conduct brought the policy into play; and (iv) that the discharge and the conduct bringing the policy into play are causally connected."[40]

If the employee successfully establishes a prima facie case, the employer must then "articulate a legitimate reason for the discharge."[41] Should the employer provide sufficient evidence that a legitimate reason prompted the employee's termination, "the employee must prove that engaging in the protected conduct was a

36. *Id*.

37. *Id*. at 1281 (citing Jill S. Goldsmith, Note, *Employment-at-Will-Employers May Not Discharge At-Will Employees for Reasons that Violate Public Policy*-Wagenseller v. Scottsdale Memorial Hospital, 1986 ARIZ. ST. L.J. 161, 166-67). In notes 67 through 69, Goldsmith describes examples of actions that would meet the four elements. For example, refusing to commit an illegal act could cover discharge for an employee who refuses to commit perjury. *See id*. at 166 n.67. Termination of an employee who served on a jury would be an example of discharge for performing a public obligation. *See id*. at 167 n.68. Terminating an employee who decided to receive worker's compensation would be an example of terminating an employee who was exercising a legal right or privilege. *See id*. at n.69.

38. *See id*. at 1285.

39. 972 P.2d 395 (Utah 1998).

40. *Id*. at 404.

41. *Id*. at 405. The court indicated that the employer bears the burden of producing admissible evidence of another reason for terminating the employee. *See id*. at 405 n.5.

'substantial factor' in the employer's motivation to discharge the employee."[42]

III. *BURTON V. EXAM CENTER INDUSTRIAL*

A. The Facts

Exam Center Industrial ("Exam Center") is an industrial medical clinic whose operations include performing physical examinations for workers referred to it by other employers.[43] Burton worked as a physician and reported directly to Howard Boulter, who allegedly made the decision to terminate Burton and other "older" doctors.[44] In explaining why Burton was discharged, Boulter purportedly stated, "I didn't know how much longer you older guys wanted to work."[45] Exam Center denied that Boulter made any type of statement regarding Burton's age, contending that Burton was discharged because Exam Center no longer needed his services.[46]

Seeking a remedy under the UADA, Burton filed a discrimination complaint with the UADD. The UADD rejected his claim, however, because Exam Center employed fewer than fifteen individuals.[47]

B. Procedural History

After the UADD rejected his claim, Burton brought suit against Exam Center in state district court, seeking relief for tortious wrongful termination in violation of a public policy.[48] Exam Center moved for summary judgment, which the district court originally denied but then granted on Exam Center's motion for reconsideration.[49] The district court then entered an order dismissing Burton's cause of ac-

42. *Id.* at 405.

43. *See* Brief for Appellant at 2, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000).

44. *See Burton*, 2000 WL 38469, at *1.

45. *Id.*

46. *See* Brief for Appellee at 5-6, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000).

47. *See Burton*, 2000 WL 38469, at *1.

48. *See id.*

49. *See id.*

tion for tortious wrongful termination.[50] Burton subsequently obtained leave to bring an interlocutory appeal from the order to the Utah Supreme Court.[51] Exam Center then filed a Motion for Summary Disposition with the supreme court.[52]

The court heard oral arguments, but requested amicus briefs prior to rendering a decision.[53] After receiving the amicus briefs, the court allowed each party to file a response brief.

C. The Utah Supreme Court's Holding

On January 19, 2000, the Utah Supreme Court announced its decision: by a narrow three-to-two margin, the court rejected Burton's claim affirming the district court's decision.[54] Chief Justice Howe, writing for the majority, indicated that Burton had failed to identify a public policy (as defined under Utah law) against age discrimination in employment.[55] Howe further argued that recognizing Burton's claim would cause undue hardship on small employers.[56]

In dissent, Associate Chief Justice Durham accused the majority of failing to carefully analyze the public policy justifying Burton's claim.[57] Durham also predicted that the majority's decision would "create an enormous loophole which Utah employers may exploit to the detriment of many Utah employees."[58]

IV. ANALYSIS

This section analyzes the reasoning of the majority and dissenting opinions in *Burton*, focusing on two specific issues. First, it com-

50. *See* Appellee's Brief, at 6.

51. *See id.*

52. *See id.*

53. Three parties accepted the court's invitation to submit an amicus brief. The ACLU and AFL-CIO each submitted an amicus brief on behalf of Burton. *See* Brief for Amicus ACLU, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000); Brief for Amicus ALF-CIO, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000). Utah Manufacturers Association (a collection of various business interests) filed on behalf of Exam Center. *See* Brief for Amicus Utah Manufacturers, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000).

54. *See* Burton v. Exam Center Indus., No. 980040, 2000 WL 38469, at *6 (Utah Jan. 19, 2000).

55. *See id.* at *5.

56. *See id.* at *6.

57. *See id.* at *7.

58. *Id.*

pares the relative strengths of the policy-related arguments made by the majority and dissent, concluding that the majority offered the stronger arguments. Second, it examines Burton's claim under established Utah law governing the tort of discharge in violation of public policy—a step the majority in *Burton* never took. This analysis shows that the supreme court rightfully rejected Burton's claim. However, the majority's focus on public policy rather than Burton's failure to satisfy the tort's established requirements made the decision appear to be a closer call than it truly was.

A. Who is Correct—The Majority or the Dissent?

1. The majority's arguments

The majority's determination to affirm the district court's decision was correct on both legal and public policy grounds for two reasons. First, though Burton and amici ACLU and AFL-CIO raised compelling public policy reasons why the court should allow Burton to proceed with a tort claim based on discharge in violation of a public policy, Exam Center's policy arguments to the contrary were more persuasive. Second, the cases that Burton and Justice Durham's dissent relied upon are easily distinguished from *Burton*'s facts.

a. Separation of powers. The majority's most powerful public policy argument involves the doctrine of separation of powers. With respect to this doctrine, the majority indicated that "[d]ue respect for the legislative prerogative in lawmaking requires that the judiciary not interfere with enactments of the Legislature where disagreement is founded only on policy considerations and the legislative scheme employs reasonable means to effectuate a legitimate object."[59]

Two well-established principles of Utah law support the majority's separation of powers argument. First, Utah courts have recognized that not only can the legislature create rights that do not exist at common law or under the Constitution but it can also limit the applicability of those rights to certain groups of individuals. Second, the courts have also maintained that when the legislature creates such a right, the judiciary's role is limited to interpreting and applying the applicable law. These principles apply directly to protection from age discrimination, which is a legislatively-created right.

59. *Id.* at *5.

(1) Legislative ability to create limited rights. Utah courts have previously recognized the right of the legislature to create rights that are limited to certain groups of individuals. Two examples illustrate this principle. The first is a judicial interpretation of Utah's wrongful death statute, which created a right to bring a wrongful death claim that did not exist at common law, while the second involves a decision sustaining a Utah statute limiting the right to recover general damages in a personal injury claim.

(a) Wrongful death statute. In *State Farm Mutual Auto Insurance Co. v. Clyde*,[60] the Utah Supreme Court entertained a claim brought under the wrongful death statute by grandparents of a minor child.[61] Under Utah law, parents and guardians have a statutorily created right to bring a cause of action against a party who caused the death of a minor.[62] In *Clyde*, the plaintiffs argued that, because they had provided for the child's maintenance and were her sole means of support, they should be able to recover under the wrongful death statute even though they were not the child's biological parents.[63] The court rejected the plaintiffs' claim that they were *de facto* parents or guardians and affirmed the district court's decision to grant the defendant's motion for summary judgment.[64]

While expressing sympathy for the grandparents' loss, the court stated that "[t]he fact that the result in some circumstances may be to unreasonably *restrict the class of persons* who can bring a wrongful death action is an argument for amendment of the statute, *not for our ignoring its words.*"[65] The court held that, even though the result may be unfortunate, the court was not entitled to "ignore the plain language of section 78-11-6."[66]

The *Clyde* court's reasoning is equally applicable to the plaintiff's claim in *Burton*. While the result for Burton (assuming that he was indeed discharged due to his age) may be unfortunate, the court must not ignore the UADA's plain statutory language to remedy a perceived inequity. The court is thus limited to applying the statute

60. 920 P.2d 1184 (Utah 1996).
61. *See id.* at 1185.
62. *See* UTAH CODE ANN. § 78-11-6 (1998).
63. *See Clyde,* 920 P.2d at 1185.
64. *See id.* at 1186-87.
65. *Id.* at 1187 (emphasis added) (citation omitted).
66. *Id.*

as written, rather than attempting to correct it. The proper method of statutory alteration is the legislative amendment process.

(b) Personal injury protection. Utah's Personal Injury Protection (PIP) statute prevents an accident victim from collecting general damages unless certain conditions are met, such as the incurring of medical expenses in excess of $3,000.[67] In *Warren v. Melville*,[68] the plaintiff's medical expenses totaled $2,583.56; thus, based on express statutory language, the plaintiff was not entitled to collect general damages.[69]

In defense of its decision to deny the plaintiff's claim, the court stated that "we determine that Utah's no-fault statute 'should not be discarded because some members of the class have rights, which may be adversely affected.'"[70] The court reasoned that "an individual's. . .interests 'may, in some cases, have to yield to the power of the Legislature to promote the public health, safety, morals, and welfare.'"[71]

Thus, the *Warren* court not only recognized the legislature's power to limit statutorily created rights but also indicated that the legislature has the ability to *substitute* a right that existed for all individuals at common law with a statutory right applicable to a limited class of individuals. If it is appropriate for the courts to allow the legislature to limit a common law right to a limited number of individuals as *Warren* states, then the courts should also defer to the legislature when it creates a limited right that did not exist at common law or under the Constitution. The legislature, therefore, acted well within its authority when it limited the UADA's remedies. The *Burton* court correctly applied the law as stated.

(2) Deference to legislative intent. Utah courts have consistently acknowledged that the legislature—and not the courts—is the proper body to effectuate changes to statutory law. Statements made

67. *See* UTAH CODE ANN. § 31-A-22-309 (1998). This statute limits the recovery of general damages to those persons whose medical expenses resulting from the accident exceed $3,000 or whose injuries include death, dismemberment, permanent disability, permanent impairment, or permanent disfigurement. *See id.*

68. 937 P.2d 556 (Utah App. 1997).

69. *See id.* at 558.

70. *Id.* at 561 (quoting Masich v. United States Smelting, Refining & Mining Co., 191 P.2d 612, 624 (Utah 1948)).

71. *Id.* at 562 (quoting Berry v. Beech Aircraft Corp., 717 P.2d 670, 677 (Utah 1985)).

by the Utah Supreme Court in *Stanton v. Stanton*[72] and *State Farm Mutual Auto Insurance Co. v. Clyde*[73] illustrate the court's recognition of the legislature's prerogative to balance policies that it deems important.

In *Stanton*, the Utah Supreme Court interpreted a state statute that set the age of majority for males at twenty-one and females at eighteen for determining support obligations in divorce cases.[74] While recognizing that the difference in age might be discriminatory, the court stated that "[d]ue to the important concept of separation of powers in our government, the courts should defer to the prerogative of the legislature to make the laws, and *confine their own actions to interpreting and applying them*."[75] The court added that "in order to maintain and safeguard the balance of power so essential to our system of government, we think it is correct and desirable to adhere to a policy of caution and restraint in respect for the action of the legislature."[76]

The *Burton* majority's approach to statutory interpretation parallels that of the *Stanton* court. The majority concluded that "[d]ue respect for the legislative prerogative in lawmaking requires that the judiciary not interfere with enactments of the Legislature where disagreement is founded only on policy considerations and the legislative scheme employs reasonable means to effectuate a legitimate end."[77] Thus, the majority properly limited its work to interpreting and applying the statute rather than modifying or partially repealing it. Allowing Burton to bring a tort claim for discharge in violation of a public policy would have indirectly modified the UADA rather than simply interpreting or applying it.

Deference to legislative intent is appropriate even when the court believes the result to be inequitable. As previously discussed, the *Clyde* court realized that it could not ignore the statute's plain language even if it caused an inequitable result.[78] This conclusion is equally applicable to *Burton*. While the class of persons protected by

72. 517 P.2d 1010 (Utah 1974), *rev'd*, 421 U.S. 7 (1975).

73. 920 P.2d 1184 (Utah 1996).

74. *See Stanton*, 517 P.2d at 1011.

75. *Id.* at 1011-12 (emphasis added).

76. *Id.* at 1012.

77. Burton v. Exam Center Indus., No. 980040, 2000 WL 38469, at *5 (Utah Jan. 19, 2000).

78. *See Clyde*, 920 P.2d at 1187.

the UADA may be unreasonably restricted, this "is an argument for amendment of the statute, *not for [the court's] ignoring its words.*"[79]

The separation of powers argument in favor of Exam Center goes even further than illustrated in the above cases. The majority concluded that "[i]n matters not affecting fundamental rights, the prerogative of the legislative branch is broad and must by necessity be so if government is to be by the people through their elected representatives and not by judges."[80]

b. Impact on small employers. In making its decision to reject Burton's appeal, the *Burton* majority also considered the impact that recognizing the tort of discharge in violation of public policy would have on small employers. The majority found that allowing a tort claim would not only defeat the purposes of the statutory requirement establishing a minimum number of employees, but also would result in small employers bearing greater costs than would large employers, who are protected by the UADA.[81]

The majority expressed an additional concern that smaller employers would not have the benefits of the "simplified procedure" provided by the UADA and would instead be subject to the longer statute of limitations and the full range of tort liability.[82] The UADA, as previously explained, contains specific provisions detailing the procedure for an aggrieved individual to follow in making an employment discrimination claim.[83] First, any claim must be filed within 180 days.[84] An investigator is then assigned to negotiate a settlement between the parties,[85] and "[c]onciliation between the parties is to be urged and facilitated at all stages of the adjudicative process."[86] The UADA's extensive dispute resolution structure embodies the concept of a resolution process that is faster, less expensive, and focused on compromise settlements.

The majority correctly argued that small employers would be worse off if subject to a tort claim because they would not receive

79. *Id.* (emphasis added) (quoting Kelson v. Salt Lake County, 784 P.2d 1152, 1157 (Utah 1989)).

80. *Id.*

81. *See Burton*, 2000 WL 38469, at *5-6.

82. *See id.* at *6.

83. *See supra* Part II.A.3; *see also* UTAH CODE ANN. § 34A-5-107 (1998).

84. *See* § 34A-5-107(1)(c).

85. *See* § 34A-5-107(3)(a).

86. *See* § 34A-5-107(10).

the protection afforded by the UADA's administrative review process. Even if the costs of actual compliance are simply ignored, the disadvantages to a small employer in the handling of possible claims are still readily apparent for several reasons. First, the small employer would be subject to a longer statute of limitations.[87] Second, no investigator would be assigned to attempt settlement or evaluate the basis of the claim prior to litigation. Third, unlike the UADA, where the emphasis on conciliation avoids many costs, tort suits against small employers usually involve the costly (both in time and money) process of discovery as well as full-length trials. As a result, small employers would be *better off* under the UADA than they would be outside of its jurisdiction. Thus, recognizing the tort for discharge in violation of a public policy would clearly contradict what Congress envisioned when implementing Title VII and subsequent civil rights legislation (at least with respect to protecting small employers).

2. The dissent: powerful arguments—just not powerful enough

Justice Durham's dissent raised powerful policy arguments explaining why the court should recognize Burton's claim for discharge in violation of a public policy. She argued that failure to allow Burton's claim to go forward would essentially give smaller employers license to discriminate against their employees and frustrate the legislature's goal of eliminating discrimination and undermine the quality of life enjoyed by both Utahans and society as a whole.

a. License to discriminate? The dissent's most compelling policy argument is that employers could construe the court's refusal to recognize a tort claim for discharge in violation of a public policy as tacit approval for small employers to discriminate, based not only on age, but also on race, sex, religion, and disability.[88] Thus, not

87. While an aggrieved individual would be required to file a complaint within 180 days, an employer not covered by the provisions of the UADA would be subject to the statute of limitations applicable to torts generally. Under Utah law, that is four years. *See* UTAH CODE ANN. 78-12-25 (1998).

88. *See Burton*, 2000 WL 38469, at *7 (Durham, J., dissenting). In addition, the amicus brief for the ACLU claimed that refusing to recognize the tort would result in small employers receiving a license to discriminate. *See* Brief for Amicus ACLU at 5-10, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000). However, the dissent appeared to miss the mark. Public policy regarding discharge in violation of religion, race, or sex has been stated in other statutes or in the Utah State Constitution, and thus the tort would be available in those cases.

allowing a tort claim would allow employers with fewer than fifteen employees to discriminate without any serious repercussions.[89]

The dissent based its opinion on similar types of cases from other jurisdictions. One such case was *Molesworth v. Brandon*,[90] in which a Maryland appellate court examined the issue of whether an employer should be exempt from claims of sexual discrimination simply because the employer had fewer than the fifteen employees required by statute.[91] The court allowed the tort of discharge in violation of a public policy because Maryland's "General Assembly [did not] intend[] to grant small businesses in Maryland a license to discriminate."[92]

The Ohio Supreme Court made a similar finding in *Collins v. Rizkana*.[93] At issue in *Collins* was an Ohio anti-discrimination statute (*Ohio Revised Code Ann.* 4112.01(A)(2)) requiring that an employer have four or more employees to be subject to the statute.[94] The *Collins* court overturned a lower court's grant of summary judgment to the defendant, ruling that the statute could not be interpreted "as an intent by the General Assembly to grant small businesses in Ohio a license to sexually harass/discriminate against their employees with impunity."[95] Rather, the statute was evidence of "an intention to exempt small businesses from the burdens . . . [of the statute], not from its anti-discrimination policy."[96] The court concluded that "we cannot find it to be Ohio's public policy that an employer with three employees may condition their employment upon the performance of sexual favors while an employer with four employees may not."[97]

89. *See Burton*, 2000 WL 38469, at *7 (Durham, J., dissenting). This argument ignores any consequences a small employer would face resulting from age discrimination such as the loss of key employees, lower employee morale, and a poor business reputation. The statement is meant to address only the *legal* consequences of such actions.

90. 672 A.2d 608 (Md. 1996).

91. *See id.* at 609-10.

92. *Id.* at 615. The court held that Maryland's policy "against sex discrimination is ubiquitous." *Id.* at 613. In addition, the court pointed to "at least thirty-four statutes, one executive order, and one constitutional amendment in Maryland that prohibits discrimination based on sex in certain circumstances." *Id.* Utah, on the other hand, has been virtually silent as to discrimination based on age.

93. 652 N.E.2d 653 (Ohio 1995).

94. *See id.* at 655.

95. *Id* at 660-61.

96. *Id.* at 661.

97. *Id.* The *Collins* court was able to point to other statutory provisions forbidding sexual discrimination as well as a general public policy statement in one of the statutes forbidding

The power of the dissent's argument is thus evidenced by two other states' courts that openly rejected the notion of permitting small employers to discriminate while holding to a higher standard those employers who employed at least the statutory minimum. Both courts allowed a tort claim for discharge in violation of a public policy to go forward.[98] The courts correctly concluded that efforts to eliminate employment discrimination should not be limited on the basis of the size of the employer. Discrimination should be either tolerated or eliminated. In any case, the solution to discrimination should not be a scheme that essentially grants "qualified immunity" to employers of certain size.

In support of the dissent, a decision by the Utah Supreme Court recognizing a wrongful discharge in *Burton* would have sent a strong message to Utah citizens and surrounding states that age discrimination will not be tolerated. Also, the court would have bolstered the idea that any effort to purge society of discrimination is doomed to fail unless society consistently conveys that discrimination will not be tolerated in any form.

b. Other policy arguments. The dissent also pointed to two other policy reasons why the lower court's ruling should be overturned. First, the dissent argued that a significant majority (69.7%) of Utah employers employ less than fifteen employees, the UADA's statutory minimum number. Thus, failure to allow a tort of discharge in violation of a public policy would frustrate the broad goal of the legislature to eliminate discrimination.[99] Second, the dissent contended that "the way in which a state regulates relations between employees

the practices of sexual discrimination. *See id*. at 658. Once again, other statutes and a public policy statement forbidding age discrimination cannot be found under Utah law.

98. Two other states addressed the issue of age discrimination. The Supreme Court of Washington allowed the tort claim to go forward on the strength of a statute separate from Washington's equivalent of the UADA, which stated a public policy and implied a remedy. *See* Bennett v. Hardy, 784 P.2d 1258, 1262-66 (Wash. 1990). However, the court did not "reach plaintiffs' claim that the statutory scheme treats employees of small firms in such a way as to offend the state constitution's privileges and immunities clause." *Id*. at 1260. Conversely, the Supreme Court of California openly rejected recognizing a tort for discharge in violation of a public policy because the employer did not employ at least five employees. *See* Jennings v. Marralle, 876 P.2d 1074, 1079-81 (Cal. 1994). The court held that "while the Legislature has made a broad statement of policy, it has not extended that policy to small employers." *Id*. at 1079.

99. *See* Burton v. Exam Center Indus., No. 980040, 2000 WL 38469, at *9 (Utah Jan. 19, 2000).

and employers has a significant impact on the quality of life for many of its citizens and ultimately for the society as a whole."[100]

The power of the dissent's arguments is evident in the percentages alone. Nearly seventy percent of Utah employers employ less than fifteen employees.[101] Thus, the dissent intimates that seventy percent of Utah employers have now been given a license to engage in age-based discrimination. As the dissent succinctly stated, the majority's decision creates "an enormous loophole which Utah employers may exploit to the detriment of many Utah employees."[102]

c. The forgotten public policy argument. The dissent omitted a potentially significant policy argument stemming from general tort law. A common tort principle states that when in doubt, in cases of intentional injury, the burden of the injury should lie with the party causing the harm.[103] Furthermore, a court should not determine whether a cause of action exists based on the status of the victim (or worse yet, the status of the tortfeasor) instead of the wrong suffered.

Together, these arguments support the dissent's conclusion that the *Burton* court should have acknowledged the tort of discharge in violation of a public policy. In an employment context, it seems only fair that a defendant should bear the burden of paying damages if his or her actions resulted in the unfair discharge of the plaintiff. This question of fairness directly affects Burton, who is left without a remedy because his tort claim cannot go forward.[104] Moreover, the dissent could have argued that the intent of the UADA was not to guarantee an employee access to recovery if that employee happened to be the fifteenth employee but deny access if an employee happened to be the fourteenth employee.

3. Public policy and other considerations favoring the majority

In many ways, neither party deserved to lose the public policy side of this case. Each party pointed to compelling reasons why the Utah Supreme Court should rule in its favor. *Burton* thus begs the

100. *Id.*

101. *See id.*

102. *Id.* at *7.

103. *See, e.g.*, PROSSER ET AL., TORTS-CASES AND MATERIALS, 17-88 (9th ed. 1994).

104. Appellant urged that the *Utah State Constitution* requires a remedy under its open courts provisions. *See* Brief for Appellant at 11, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000).

question: which should the courts favor, the rights of the individual or the collective legislative majority?

Despite the fact that both the majority and the dissent advanced solid public policy reasons for their respective decisions, there are three reasons why the majority's public policy arguments are ultimately more compelling. First, the balance of powers doctrine requires the legislature to legislate and the courts to interpret and enforce the law. Second, by effectively overruling the provisions of the UADA, the court would jeopardize all other Title VII statutory schemes. Third, there are compelling reasons besides the UADA that will encourage employers not to discriminate.

a. Legislatures should legislate and courts should enforce. While there is a valid argument to be made that the courts should resolve inequities created by the legislature, *Burton* is not a case for the court to do so. Legislatures are naturally better equipped to handle the extensive research and analysis that the legislative process requires. Furthermore, legislatures are often called upon to balance competing public policy interests. Overruling the statutory scheme in an effort to eradicate age discrimination would ignore other important issues considered in the development of the UADA. While the legislature is concerned with eliminating discrimination of all types, it has other concerns as well. The viability of small businesses is also important. Though age discrimination may cost some employees their jobs, the failure of small businesses would cause the loss of jobs as well.

A powerful argument can be made that refusal to allow the tort of discharge in violation of a public policy will promote inequity based on the status of the employee. While true, this argument also misses the mark. The current statute expressly *provides* for this type of inequity. Employees must reach the age of forty before protection becomes effective. Should the court refuse to overturn this age limitation, is it licensing the ability to discriminate against individuals that are under the age of forty?

Furthermore, discrimination *in favor* of older employees is perfectly legal under the statute as it now stands. Simply put, for a variety of reasons, the line has to be drawn somewhere. When the conflict takes place close to the line, the inequities always seem more apparent. Nevertheless, it is the role of the legislature to draw that line, and the court must respect that line despite its beliefs about possible inequities.

b. The domino effect. Title VII and its subsequent legislation limit their coverage based on the number of employees. By recognizing the tort of discharge in violation of a public policy, especially in the absence of a clear statement of that policy, all legislative employment schemes that incorporate some sort of minimum employee requirement become suspect.

The Family and Medical Leave Act (FMLA) serves as an appropriate example.[105] The FMLA applies only to employers with at least fifty employees.[106] It contains an important benefit, if not right, allowing individuals to take time away from work to care for a sick loved one without fear of losing their employment.[107] Congress, however, expressly limited this right to those persons who work for employers with fifty or more employees. A possible explanation for this is that, as with Title VII and the ADEA, Congress was attempting to weigh competing policy concerns.

Likewise, by allowing a claim for tortious discharge in violation of a public policy, the court would effectively overturn the UADA's minimum employee requirement, which would place at risk similar schemes that protect against sex and age discrimination, guarantee family medical leave, and provide other similar statutory benefits. Simply put, nullifying the minimum employee requirement would ignore the public policy reasons that Congress considered in developing the requirement. While it may be argued that changes are needed in these areas, it would be wiser to note that need and allow the legislature, in its proper role, to evaluate competing public policies and then balance the policies accordingly.

c. Other deterrents outside of the legal process that encourage employers not to discriminate. The dissent's public policy arguments ignore that there are several reasons outside the legal arena that discourage employers from discriminating on the basis of age. For example, an employer who consistently discriminates based on age or any other criteria will suffer greater turnover of employees. In addition, employee morale suffers in a work place where discrimination is tolerated. Finally, the reputation of a business will be stained if it becomes recognized as a discriminating employer.

105. *See* 29 U.S.C. § 2601 (1994).

106. *See* § 2611(4)(a)(I).

107. *See generally* § 2612 (outlining various levels of leave benefits).

d. Conclusion. To state that the majority has the better end of the public policy debate is not to discount the dissent's arguments altogether. Clearly, the court should send messages that discourage rather than encourage discrimination. Furthermore, when in doubt, courts should hold a tortfeasor liable for the damages caused by his or her inappropriate behavior. However, the juggling of competing public policies is best performed by a body responsible to the members of society it purports to represent—the legislature. The majority therefore correctly concluded that "the prerogative of the legislative branch is broad and must *by necessity be so if government is to be by the people through their elected representatives and not by judges.*"[108]

B. Stumbling at the Finish Line: What the Majority Should Have Done Differently

The majority did a good job of pointing to countervailing public policy reasons that are sufficient to justify the majority's decision to not recognize the tort of discharge in violation of a public policy. However, the court never truly analyzed Burton's claim in the context in which it was brought. A simple application of the *Ryan* test[109] to Burton's claim would have led the majority to the inescapable conclusion that Burton's claim simply fails to meet the requirements of a claim for discharge in violation of a public policy as set forth under Utah law.[110] Instead, the majority, in a cursory manner, merely dismissed Burton's attempt to establish a public policy against age discrimination.[111]

1. Burton's claim under the Ryan *analysis*

As previously mentioned, the four prongs of the *Ryan* test for tortious discharge in violation of public policy require the plaintiff to show: (1) the discharge of the employee by the employer; (2) the existence of a clear and substantial public policy; (3) the fact that the employee's conduct brought the policy into play; and (4) there exists

108. Burton v. Exam Center Indus., No. 980040, 2000 WL 38469, at *5 (Utah Jan. 19, 2000) (emphasis added).

109. *See supra* Part II.B.2.

110. In fairness to the majority, it is unclear whether either party or any of the amicus briefs filed pursued a thorough *Ryan* analysis either.

111. *See Burton*, 2000 WL 38469, at *4-5. Not only is the court's analysis cursory, but it is also incomplete, addressing only one of the four prongs of the *Ryan* test. *See id*.

a causal connection between the discharge and the conduct that brought the public policy into play.[112] A close analysis of Burton's claim under this test reveals that his claim simply falls short of meeting the requirements of the tort.

a. Discharge. The facts of *Burton* easily satisfy the first prong of the *Ryan* test. All that is required is a showing that the employee has been discharged.[113] Although the parties disagreed about the reasons underlying Burton's termination, neither disputed the fact that Burton was discharged.[114]

b. Public policy. The second prong of the test—that a clear and substantial public policy exists[115]—was the element of the *Ryan* test most contested by the parties.[116] The standard in *Ryan* indicates that "[a] public policy is 'clear' only if plainly defined by legislative enactments, constitutional standards, or judicial decisions."[117]

(1) The absence of public policy statements in Utah legislative enactments, constitutional standards, and judicial decisions. Legislative enactments concerning employment discrimination in Utah are few and far between. Indeed, Burton and amici ACLU and AFL-CIO located only two Utah laws that address age discrimination in

112. *See* Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 404 (Utah 1998).

113. *See id.*

114. *See* Brief for Appellant at 3, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000). (claiming that Burton was discharged because of age); Brief for Appellee at 5, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000) (arguing that Burton's discharge was the result of his services no longer being required).

115. *See Ryan*, 972 P.2d at 404.

116. The issue of a clear and substantial policy was argued in all briefs submitted to the court. Appellant's argument regarding this issue covered nearly four full pages. *See* Brief for Appellant at 7-10, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000). Likewise, Appellee's discussion of the issue took up more than five pages. *See* Brief for Appellee at 8-13, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000). Amicus Utah Manufacturer's Association dedicated four pages of its brief to the issue, *see* Brief for Amicus Utah Manufacturers Burton v. Exam Center Indus., at 7-11, No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000), while amicus AFL-CIO dedicated four pages, *see* Brief for Amicus ALF-CIO at 5-8, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000), and amicus ACLU dedicated two pages (followed by eight pages arguing that the UADA underscores the existing clear and substantial public policy), *see* Brief for Amicus ACLU at 3-10, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000).

117. *Ryan*, 972 P.2d at 405.

the employment context: the UADA[118] and a now-repealed statute that applied only to the State as an employer.[119]

(a) Public policy in the UADA. The UADA, as a clear statement of a public policy, is limited to what it says on its face.[120] The relevant portion of the statute states that "[i]t is a discriminatory or prohibited employment practice for an employer to refuse to hire, or promote, or to discharge . . . any person . . . because of . . . age, if the individual is 40 years of age or older."[121] However, the UADA defines an "employer" as a person "employing 15 or more employees."[122] Thus, the UADA does not apply to employers of fewer than fifteen employees. As the majority concluded, "[the Utah] legislature has made a . . . decision to prohibit age discrimination in the termination of employees only by large employers."[123]

Furthermore, the UADA is devoid of any general statement of public policy. In other words, the Act details actions that constitute discrimination, defines various terms, and outlines the complaint procedure to follow but never states the public policy reasons underlying the legislature's implementation of the Act.

In contrast, in *Molesworth v. Brandon*, the Maryland Court of Appeals had a public policy statement to which it could point.[124] The court used this public policy and considered the plaintiff's claim for wrongful discharge in violation of public policy even though the plaintiff's employer had fewer than fifteen employees, as required under Maryland's Fair Employment Practices Act (FEPA).[125] While sustaining the plaintiff's claim for wrongful discharge in violation of a public policy, the court referred to the public policy statement in FEPA for support.[126] That statement declared that

> *[i]t is hereby declared to be the policy of the State of Maryland*, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business

118. *See* UTAH CODE ANN. § 34A-5-102 (1998).

119. *See* § 67-10-2(4) (repealed 1995).

120. *See Ryan*, 972 P.2d at 405.

121. § 34A-5-106(1)(a)(i).

122. § 34A-5-102(8).

123. Burton v. Exam Center Indus., No. 980040, 2000 WL 38469, at *4 (Utah Jan. 19, 2000).

124. 672 A.2d 608 (Md. 1996).

125. *See id.* at 611-12; *see also* MD. CODE ANN. § 14 (1957).

126. *See Molesworth*, 672 A.2d at 611-12.

> and good government and for the promotion of the State's trade, commerce and manufacturers *to assure all persons equal opportunity in receiving employment* and in all labor management-union relations *regardless of race, color, religion, ancestry or national origin, sex, age, marital status, or physical or mental handicap* unrelated in nature and extent so as to reasonably preclude the performance of the employment, and to that end *to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.*[127]

The *Burton* dissent's reliance on *Molesworth* is unfounded.[128] The UADA is devoid of any kind of public policy statement similar to the one contained in the Maryland statute. Therefore, it cannot be said that the UADA contains a clear statement of public policy against employment discrimination *regardless* of the size of the employer.

(b) Public policy and the state as employer. Amicus ACLU argued that a clear statement of public policy could be found in a state law, since repealed but applicable at the time of the suit, that prohibited employment discrimination by the *State* in its employment practices.[129] The majority correctly dismissed this argument, despite the fact that it did so with little analysis,[130] noting only that "[w]hile arguably a public policy can be found in that statute[,] . . . it obviously has no application to a private employer."[131]

Amicus ACLU's argument is fatally flawed for three reasons. First, it overlooks the fact that the statute has been repealed and that a case should be both determined upon those laws in force at the time of decision and based on the relevant public policy at the time of decision.[132] Second, the law's statement of public policy reflects the legislature's intent with respect to how the *State* should handle its employment matters.[133] Finally, the replacement state regulation

127. *Id.*

128. *See Burton*, 2000 WL 38469, at *9 (Durham, J., dissenting).

129. *See* Brief for Amicus ACLU at 3, Burton v. Exam Center Indus., No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000) (quoting UTAH CODE ANN. § 67-19-2(4) (repealed 1995)).

130. *See Burton*, 2000 WL 38469, at *5.

131. *Id.* at *4.

132. *See, e.g.*, *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (holding generally that a court's decision is to be based on law at the time of actual decision rather than at time the suit was filed).

133. *See* UTAH CODE ANN. § 67-19-2(4) (1998).

lacks a public policy statement;[134] thus, any clear public policy that may have existed no longer does.

The lack of a legislative enactment that plainly defines Utah's public policy against discrimination is compounded by an absence of such a policy in the Utah State Constitution as well as state jurisprudence. With respect to Utah jurisprudence, the *Burton* case appears to be one of first impression, meaning that there is not a judicial public policy statement on which Burton could rely. While Burton could argue that there always has to be a first case, it does not necessarily follow that Burton's claim is a good candidate. The plaintiff's inability to point to a legislative enactment, constitutional provision, or judicial decision was fatal to his claim.

(2) The absence of substantial public interests. In addition to the existence of a "clear policy," it is necessary that the policy "further substantial *public*, as opposed to private, interests."[135] Burton's claim apparently would qualify because preventing his discharge would advance the public interest against age-based employment discrimination. His claim fails, however, because the requirement that the policy further substantial public interests is additional to the requirement of the existence of a clear policy. Unfortunately for Burton, that clear policy does not exist and cannot be replaced by a favorable decision that advances the public interest against age discrimination. Burton's claim thus fails the second prong of the *Ryan* test.

c. Employee conduct. Had Burton carefully framed his argument, he possibly could have satisfied the third prong of the *Ryan* test, which directs that the employee's conduct must bring the public policy into play.[136] In order to meet the third prong, however, Burton must first prove the existence of a clear public policy. Though no such policy exists (for reasons explained above), this Note assumes, for purposes of further inquiry, that the second prong of the *Ryan* test was met.

In *Peterson v. Browning*,[137] the Utah Supreme Court listed three actions that typically fall within the public policy exception relating to the termination of employment: "(1) refusing to commit an illegal

134. *See* UTAH ADMIN. CODE R606-3-2 (1997).

135. Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 405 (Utah 1998).

136. *See id.* at 404.

137. 832 P.2d 1280 (Utah 1992).

or wrongful act, (2) performing a public obligation, or (3) exercising a legal right or privilege."[138] Burton's discharge by Exam Center clearly falls outside the three examples given by the Utah Supreme Court.

Ryan, however, offers Burton another possibility. The *Ryan* court stated in a footnote that an alternative way of characterizing the third prong was to determine whether discharging employees in circumstances similar to the plaintiff's would place the public policy in jeopardy.[139] Thus, Burton could have argued that discharging individuals on the basis of age would jeopardize the public policy against age discrimination.[140] However, this argument ignores the countervailing public policy arguments supporting the limitation of the UADA's applicability, namely, protecting small employers from the cost of compliance and avoiding governmental intervention into intimate business relationships. Once again, the existence of a public policy (prong two of the *Ryan* analysis) would have to be established before the court could take this additional step, assuming that the court was willing to analyze Burton's claim based on the *Ryan* footnote.

d. Causal connection. Ryan's final requirement mandates that there be a causal connection between the discharge and the conduct bringing the policy into play.[141] As indicated previously, causation was disputed by the parties: Burton claimed that his termination was due to his age, but Exam Center argued that the discharge resulted from a lack of need for Burton's services.[142] To prevail on this point, Burton would need to prove that the discharge truly resulted from his age. However, as the case was before the court on the

138. *Id.* at 1281 (quoting Goldsmith, *supra* note 37, at 166-67).

139. *See Ryan*, 972 P.2d at 404 n.4.

140. Interestingly, amicus Utah Manufacturers Association argued that a claim for discharge in violation of public policy requires that the discharge be based on employee conduct and not status. *See* Brief for Amicus Utah Manufacturers at 19, Burton v. Exam Center Indus., at 22-23 No. 980040, 2000 WL 38469 (Utah Jan. 19, 2000). In *Burton*, the plaintiff allegedly was not discharged based on his conduct but because he was too old (status). *See supra* Part III.A. While this argument's logic is sound and appears to be based on the "typical" discharges in violation of public policy set forth in various cases, footnote four in *Ryan* would give the court an opportunity to extend the tort of discharge in violation of a public policy beyond cases involving strictly employee conduct. *See Ryan*, 972 P.2d at 404 n.4.

141. *See Ryan*, 972 P.2d at 404.

142. *See supra* note 114.

defendant's motion to dismiss, any analysis of the "merits" of the case in this Note would be premature.

The fourth requirement repeats the third prong's conduct language—that the employee's conduct must bring the public policy into play. As a result, the alternative in footnote four of *Ryan*—determining whether discharging circumstances similar to the plaintiff's would jeopardize the public policy—could be extended to cover the fourth prong as well. Thus, the need for employee conduct would be obviated.

e. Conclusion: falling short of the Ryan *requirements.* While Burton arguably met the first prong and plausibly could satisfy the third and fourth prongs of the *Ryan* test, his claim failed to satisfy the requirements of the second prong—the existence of a clear public policy. The court has consistently made statements as to the narrowness with which public policy should be construed.[143] In any case, Burton failed to demonstrate a clear public policy as defined by legislative enactment, constitutional provision, or judicial decision.

Burton's failure to demonstrate the existence of a public policy is singularly fatal to his claim and obviated the need for the court to engage in further analysis. However, such a decision could have been made after oral arguments without requesting amicus briefs, and, therefore, was not likely considered by the majority. Since the public policy arguments on both sides are strong, the court's decision was reduced to arguments based on public policy rather than a strict interpretation of the *Ryan* test. Thus, one is left with the sense that the court's decision was a response to the emotion of public policy rather than a thorough legal analysis. By failing to thoroughly analyze Burton's claim on a legal basis, the court made the decision appear much closer and more difficult than it actually was.

V. CONCLUSION

The decision facing the Utah Supreme Court in *Burton v. Exam Center Industrial* should not have been as difficult as the court

143. *See Ryan*, 972 P.2d at 405 (recognizing the importance of keeping the scope of the public policy exception narrow to avoid unreasonably eliminating employer discretion in discharging employees); *see also* Peterson v. Browning, 832 P.2d 1280, 1282 (Utah 1992) (indicating that narrow construction of public policies upon which wrongful terminations may be based is appropriate to avoid eliminating employer discretion in discharging at-will employees); Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1043 (Utah 1989) (explaining that courts must be careful to avoid the overextension of public policy).

made it. The court correctly upheld the statutory scheme set up by the Utah legislature under the UADA, even though it meant that some individuals (like Burton) suffered real harms that will go without remedy. In so doing, the majority correctly decided that rather than effecting change through judicial "legislation," any proposed change in the balancing of public priorities ought to take place in the legislature. However, the majority's failure to apply the *Ryan* test in its entirety creates the impression that the case was decided on public policy alone. While public policy arguments are particularly crucial to the debate in the present case, the majority failed to sufficiently establish one key fact: Burton's claim simply does not meet the requirements for the tort of discharge in violation of a public policy.

While most would agree that the fight against discrimination has made progress, few would argue that the success has been complete or that all residue of discrimination no longer exists in our society. The defeat of discrimination in all of its forms will not occur until all of us, on an individual basis, truly accept that discrimination in any form is improper. Until society as a whole comes to that realization, it is wiser to allow the will of the majority, as expressed by its elected representatives, to make tough policy decisions, even when a few individuals are left without a remedy. Expanding the scope of the tort of discharge in violation of a public policy in general, and the definition of public policy in particular, is not the answer; neither is legislating from the bench—even when the cause appears to be just.

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